Petition

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In the

Supreme Court of the United States

OCTOBER TERM 1981

Helen Strohl Hall ..... *Petitioner*

V.

Lamar Hall ..... *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE ARKANSAS SUPREME COURT

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QUESTIONS PRESENTED FOR REVIEW

1. Does standing to litigate the constitutionality of a gender-based dower statute exist in the male executor of the estate of the deceased male, which executor is also the guardian of a minor male son who was to receive everything under the deceased's will?

2. Is a gender-based dower statute unconstitutional?

3. Assuming a gender-based dower statute is unconstitutional, does the widow who has applied for dower receive nothing, or receive an amount equal to what a male survivor would have received, or receive exactly what she would have received under the unconstitutional statute because the court may extend the rights of disadvantaged male survivors to that level of rights possessed by female survivors?

4. When the State's highest court has declared gender-based dower statutes unconstitutional in a prior case, what is the effect of that decision on a widow whose husband died prior to the opinion in the prior case but whose case reaches the states highest court subsequent to that decision?

LIST OF PARTIES

Petitioner Helen Strohl Hall is the widow of Charles L. Hall, deceased. Respondent Lamar Hall is executor of the estate of Charles L. Hall, deceased and guardian of the estate of Charles F. Hall, a minor. Respondent Randall L. Gammell is guardian ad litem for Charles F. Hall, a minor son of the deceased devisee of all property under the will.

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Ark. Stat. [1971 Repl.]

60-501 (a), (b), (c) 2
62-2501 (a), (b), (c), (d) 3
61-201 4
61-202 4
61-206 4
61-137 (a), (b), (c), (d), (e) 5
61-148 6
61-228 6
61-229 6
61-232 7

Act 714 of 1981, effective 3-25-81, partially codified in the 1981 pocket part to Vol. 5A, Ark. Stat. Ann. [1971 Repl.] as follows:

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62-2501.1 9
62-2501.2 9
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PETITION FOR WRIT OF CERTIORARI TO THE ARKANSAS SUPREME COURT

Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Arkansas Supreme Court in this case.

OPINIONS BELOW

The opinion of the Arkansas Supreme Court dated November 16, 1981, was reported at 274 Ark. 266, 623 S.W.2d 833 (1981). That opinion is reproduced in the Appendix, infra, at A. 1.

JURISDICTION

The Arkansas Supreme Court delivered its opinion November 16, 1981.

This court has jurisdiction under 28 Sec. 1257 (c). This petition may be filed anytime within 90 days after November 16, 1981. Rules of the United States Supreme Court 20, U.S.C. 2101 (c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment 14

No state shall make or enforce any law which shall abridge the priviledges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Arkansas Constitution, Article 2, Section 3

The equality of all persons before the law is recognized, and shall ever remain inviolate; nor shall any citizen ever be deprived of any right, priviledge or immunity, nor be exempted from any burden or duty, on account of race, color, or previous condition.

State Statutes involved

Those in effect at the time of death of the deceased and election to take against the will:

60-501. Taking against will — Rights of surviving spouse — Limitations. — When a married man dies testate as to all or part of his estate, or when a married woman dies leaving as her Last Will and Testament one executed prior to her marriage, the surviving spouse shall have the right to take against the will; and in the event of such election the rights of the surviving spouse in the estate of the deceased spouse shall be limited to the following:

(a) The surviving spouse, if a woman, shall receive a dower in the deceased husband's real estate and personal property as if he had died intestate, which dower shall be additional to her homestead rights and statutory allowances;

(b) The surviving spouse, if a man, shall receive a curtesy interest in the real and personal property of the deceased spouse to the same extent as if she had died intestate.

(c) But if after the assignment of dower or curtesy, as the case may be, and the payment of all statutory allowances, taxes and debts, and the satisfaction of all testamentary gifts and devises, there shall remain some residue of the deceased spouse's estate which is not disposed of by will, then, provided the deceased spouse shall have been survived by no natural or adopted child (or the descendants of any natural or adopted child), and by no parent, brother, sister, grandparent, uncle, aunt, great grandparent, great uncle or great aunt (or the lineal descendants of any of them), the surviving spouse will take by inheritance such undisposed of residue.

62-2501. Allowances to widow and minor children. —a. In addition to their homestead and dower rights, the widow and minor children of a descedant, or either in the absence of the other, shall be entitled to have assigned to them out of the property owned by the decendant at the time of his death, personal property, tangible or intangible, to be selected, prior to the sale thereof by the personal representative (or after sale out of the proceeds thereof,) by the widow, if there be a widow, otherwise by the guardian of the minor children, of the value of two thousand dollars ($2,000.00) as against distributees, or the value of one thousand dollars ($1,000.00) as against creditors. The right to such an allowance shall vest in the widow upon the death of her spouse, shall not terminate with her subsequent death or remarriage, and shall become her absolute property (or the property of her estate upon her death) without restriction as to use, encumbrance or disposition. If any of such minor children are not children of the widow, the allowance shall vest in the widow to the extent of one-half (1/2) thereof, and the remainder shall vest in the decedent's minor children in equal shares.

b. Such furniture, furnishings, appliances, implements and equipment as shall be reasonably necessary for the family use and occupancy of her dwelling, shall be assigned to and vested in the widow, if any, provided she was living with her husband at the time of his death.

c. During a period of two (2) months after the death of the decedent, the widow and minor children, or either in the absence of the other, shall be entitled to receive from the estate such reasonable amount, not exceeding in the aggregate five hundred dollars ($500.00), as in the judgment of the court may be required for their sustenance, in accordance with the usual living standards of the family.

d. The provisions of subsections a, b and c hereof shall be cumulative, and the provisions of subsections b and c hereof shall apply as against creditors and distributees.

61-201. Dower in lands. — A widow shall be endowed of the third part of all the lands whereof her husband was seized, of an estate of inheritance, at any time during the marriage, unless the same shall have been relinquished in legal form.

61-202. Dower in personalty. — A widow shall be entitled, as part of her dower, in her own right, to one-third part of the personal estate, whereof the husband died seized or possessed.

61-206. Dower when no children. — If a husband die, leaving a widow and no children, such widow shall be endowed in fee simple of one-half (1/2) of the real estate of which such husband died seized, where said estate is new acquisition and not an ancestral estate; and one-half (1/2) of the personal estate, absolutely and in her own right, as against collateral heirs; but, as against creditors, she shall be endowed with one-third (1/3) of the real estate in fee simple if a new acquisition and not ancestral, and of one-

third (1/3) of the personal property absolutely, provided, if the real estate of the husband be an ancestral estate she shall be endowed in a life estate of one-half (1/2) of said estate as against collateral heirs, and one-third (1/3) as against creditors.

61-137. Interests transmissible by inheritance. — Heirs may inherit every right, title and interest (not terminated by the Intestate's death) in real or personal property owned by an Intestate at the time of the latter's death and not disposed of by Will, and the rights of heirs will be subject to:

(a) the dower of curtesy of the Intestate's surviving spouse;

(b) the homestead rights of the widow and/or children of the Intestate, including the quarantine rights of the widow;

(c) all statutory rights and allowances to the widow and/or minor children;

(d) any rights of a surviving spouse in respect to income tax refunds made pursuant to a joint federal income tax return;

(e) an administration of the estate, if any.

The portion of the Intestate's estate which may pass by inheritance, after giving effect to (a), (b), (c), (d) and (e) above and to any partial testamentary disposition, is hereinafter sometimes called the "heritable estate" of the Intestate.

In this connection it is hereby declared that subject to the conditions above set out, the Intestate's entire right and title in respect to any and all reversionary and remainder interests, rights of re-entry or forfeiture for condition broken, executory interests and possibilities of reverter, whether any of such interests be vested or contingent, shall

be transmissible by inheritance and will pass to the Intestate's heirs determined as of the time of his death.

61-148. Distinction between ancestral estates and new acquisitions abolished.—Only for the purposes of Intestate succession, the distinction between "ancestral estates" and "new acquisitions" in respect to real estate owned by an Intestate is hereby abolished; and the devolution of real estate and personal property which the Intestate acquired by gift, devise or descent from some ancestor shall be controlled by the same rules which apply to the devolution of real estate and personal property acquired by the Intestate in any other manner.

61-228. Curtesy.—Upon the death of a married woman, her husband shall be entitled to the following portion of her estate, undisposed of by her will; one-third (⅓) of her (real) property for life and one-third (⅓) of her personal property absolutely where she leaves descendants; one-half (½) of her real property in fee and one-half (½) of her personal property absolutely where she leave no descendants; except that where she leaves no descendants, as to the lands in which her estate is ancestral the husband shall be entitled to one-third (⅓) of her real property for life and also except where she leaves no descendants as against creditors, the husband shall be entitled to one-third (⅓) of her real property for life and one-third (⅓) of her personal property absolutely.

61-229. Assignment of curtesy—Property affected—Wife's right to dispose of property without joining husband.—The rights of the surviving husband in his wife's estate shall be known as curtesty (curtesy) and shall be assigned to him after the death of his wife and at the time and in the manner provided by law for the assignment of dower to a widow: provided, the rights of the surviving husband shall attach only to such property of the wife as she may not have disposed of prior to her death or by will. A married woman may freely dispose of any

property she may own in her own name and of her own separate estate without her husband joining in the deed, conveyance, bill of sale, contract or other instrument affecting the title to such property.

61-232. Purpose of preceding sections.—The purpose of this measure (61-228—232) is to give a surviving husband the same interest in the deceased wife's estate as a widow now has in the estate of her husband, so far as section 7 of article 9 of the Constitution permits.

Arkansas Constitution, Article 9, Section 6.

Rights of widow and children.—If the owner of a homestead die, leaving a widow, but no children, and said widow has no separate homestead in her own right, the same shall be exempt, and the rents and profits thereof shall vest in her during her natural life, provided that if the owner leaves children, one or more, said child or children shall share with said widow and be entitled to half the rents and profits till each of them arrives at twenty-one years of age—each child's right to cease at twenty-one years of age—and the shares to go to the younger children, and then all to go to the widow, and provided that said widow or children may reside on the homestead or not; and in case of the death of the widow all of said homestead shall be vested in the minor children of the testator or intestate.

Arkansas Constitution, Article 9, Section 7,

Married woman's separate property—Right of disposition—Not liable for debts of husband.—The real and personal property of any femme covert in this State acquired either before or after marriage, whether by gift, grant, inheritance, devise or otherwise, shall, so long as she may choose, be and remain her separate estate and property and may be devised, bequeathed or conveyed by her the same as if she were a femme sole, and the same shall not be subjected to the debts of her husband.

PRESENT LAW WHICH WENT INTO EFFECT MARCH 25, 1981.

60-501. Taking against will—Rights of surviving spouse—Limitations.—When a married person dies testate as to all or any part of his or her estate, the surviving spouse shall have the right to take against the will provided the surviving spouse has been married to the decedent continuously for a period in excess of one (1) year, and in the event of such election the rights of the surviving spouse in the estate of the deceased spouse shall be limited to the following:

(a) The surviving spouse, if a woman, shall receive dower in the deceased husband's real estate and personal property as if he had died intestate, which dower shall be additional to her homestead rights and statutory allowances.

(b) The surviving spouse, if a man, shall receive a curtesy interest in the real and personal property of the deceased spouse to the same extent as if she had died intestate, which curtesy interest shall be additional to his homestead rights and statutory allowances.

(c) But if after the assignment of dower or curtesy, as the case may be, and the payment of all statutory allowances, taxes and debts, and the satisfaction of all testamentary gifts and devises, there shall remain some residue of the deceased spouse's estate which is not disposed of by will, then, provided the deceased spouse shall have been survived by no natural or adopted child (or the descendants of any natural or adopted child), and by no parent, brother, sister, grandparent, uncle, aunt, great grandparent, great uncle or great aunt (or the lineal descendants of any of them), the surviving spouse will take by inheritance such undisposed of residue.

62-2501.1 Right of surviving spouse to live in house for two months—Sustenance.—A surviving spouse may tarry in the mansion or chief dwelling house of the deceased spouse for two (2) months after death, whether dower or curtesy be sooner assigned or not, without being liable to any rent for the same; and, in the meantime, he or she shall have a reasonable sustenance out of the estate of the deceased spouse.

62-2501.2. Extension of surviving spouse's quarantine.—If the dower or curtesy of any surviving spouse is not assigned and laid off within two (2) months after the death of a deceased spouse, the surviving spouse shall remain in and possess the mansion or chief dwelling house of the deceased spouse, together with the farm thereto attached, free of all rent, until dower or curtesy shall be laid off and assigned to the surviving spouse.

62-2501.3. Allowance paid surviving spouse out of rent until apportionment of curtesy or dower.—Until curtesy or dower be apportioned, the court shall order such sums to be paid to the surviving spouse out of the rent of the real estate as shall be in proportion to his or her interest in the real estate.

61-201. Dower and curtesy in lands.—a. If a person dies leaving a surviving spouse and a child, such surviving spouse shall be endowed of the third part of all the lands for life whereof his or her spouse was seized, of an estate of inheritance, at any time during the marriage, unless the same shall have been relinquished in legal form.

b. For purposes of the preceding (following) sections (61-201 through 61-227) the word "endowed" shall mean invested and shall apply both to dower and curtesy.

61-202. Dower and curtesy in personalty.—If a person dies leaving a surviving spouse and a child or children, such surviving spouse shall be entitled, as part of dower or

curtesy, in his or her own right, to one-third (⅓) part of the personal estate, whereof the deceased spouse died seized or possessed.

61-206. Dower or curtesy when no children.—If a person die, leaving a surviving spouse and no children, such surviving spouse shall be endowed in fee simple of one-half (½) of the real estate of which such deceased person died seized where said estate is a new acquisition and not an ancestral estate; and one-half (½) of the personal estate, absolutely, and in his or her own right, as against collateral heirs; but, as against creditors, said surviving spouse shall be invested with one-third (⅓) of the real estate in fee simple if a new acquisition and not ancestral and of one-third (⅓) of the personal property absolutely. Provided, if the real estate of such deceased person be an ancestral estate, the surviving spouse shall be endowed in a life estate of one-half (½) of said estate as against collateral heirs, and one-third (⅓) as against creditors.

STATEMENT OF THE CASE

The Suit and Issues Below

Charles L. Hall, aged 61 years, died April 1st, 1980. Surviving him were a son, Charles F. Hall, age fifteen and a widow, Helen Hall, petitioner in this Court. He left a will dated June 20, 1979. The will left to his son all his property and appointed Lamar Hall, his brother, as guardian of the person and estate of his son as well as executor of the estate. The will was admitted to probate April 21, 1980.

On April 24, 1980 Helen Hall filed an election to take against the will, citing Ark. Stats. 60-501, and a petition for statutory allowances, citing Ark. Stat. 62-2501, *et seq.* The petition alleged that there were no children of the marriage in that Charles F. Hall was an adopted son of the decedent whom petitioner did not adopt.

On May 19, 1980, the court appointed Randall L. Gammill as guardian ad litem to represent Charles F. Hall in a hearing on a petition of the executor to mortgage real estate. Mr. Gammill thereafter appears in the record as attorney for the executor, respondent in this Court.

The inventory of the estate showed that the estate contained real and personal property which, after deduction for mortgages and liens, had a net value of $357,927.50.

Raising of Federal Questions

On October 6, 1980, the executor filed his response to the widow's election to take against the will and for statutory allowances to the effect that both should be denied in that the statutes under which the claims were made, Ark. Stat. 60-501 and 62-2501, discriminate against male decedents in violation of the Equal Protection clause of the Fourteenth Amendment to the United States Constitution and Article Two, Section Three of the Arkanas

Constitution. The response further alleged these statutes were in violation of the due process clause of the Fourteenth Amendment to the United States Constitution in that they authorize a taking of a person's property without first providing a hearing as to sufficient need. Transcript, hereafter "T.", pp 87-88. A similar response on the same grounds was filed by Lamar Hall in his capacity as guardian of the estate of Charles F. Hall, a minor. Lamar Hall was allowed to intervene in his capacity as guardian of the estate and person of Charles F. Hall, a minor, on the ground that Charles F. Hall may be the only person with the necessary standing to litigate the constitutionality of the statutes involved, T. 116-117.

On December 2, 1980, respondent as executor and guardian filed a motion for summary judgment on the constitutionality of the statutes underlying petitioner's claim. T. 123-124. The brief in support thereof relied on *Orr v. Orr*, 440 U.S. 268, 99 S.Ct. 1102, 50 L.Ed.2nd 306 (1979) and Arkansas cases based on that case. T. 124-126.

On December 12, 1980, petitioner filed her response to the motion for summary judgment and brief on the constitutionality issue. T. 193-205. The response indicated she was standing on her position that the Arkansas Statutes are constitutional. T. 194. The brief in support thereof argued that the executor did not have standing to litigate the constitutionality of the statute because he did not belong to the class of persons whose rights were allegedly infringed. T. 196-198. The brief argued that *Orr v. Orr, supra*, does not compel a finding that the Ark. dower statutes are unconstitutional. The brief further argued that petitioner was entitled to dower even if the statutes are unconstitutional because dower exists at common law. T. 203. Finally, petitioner in her brief asserted that she should still take dower as it vested April 1, 1980 at the time of death and that a finding of unconstitutionality should be given prospective effect only. T. 204.

In his response to petitioner's motion for summary judgment, respondent argued the constitutional issues thoroughly and moved for summary judgment. T. 213-133.

Summary judgment was entered February 25, 1981 against petitioner. The trial court specifically held Ark. Stat. 60-501 and 62-2501 *et seq.* to be unconstitutional and of no force and effect. The judgment stated that petitioner was to take no interest in the estate of the deceased. T. 296-97.

Disposition by the Arkansas Supreme Court

The same federal issues were argued in the Arkansas Supreme Court which affirmed the trial court's decision. Two days before the trial court's decision the Arkansas Supreme Court had held the dower statute unconstitutional in *Stokes v. Stokes*, 271 Ark. 300, 613 S.W.2d 372 (February 23, 1981) and *Hess v. Wims*, 272 Ark. 413, 613 S.W.2d 85 (February 23, 1981). That court in this case declined to overrule *Stokes* and *Hess* and specifically declined to give those decisions prospective effect only. Finally, the court refused to extend the rights of widowers to equalize the rights of widowers and widows.

REASONS FOR GRANTING THE WRIT

1. The State Courts of Last Resort Are Split With Regard To Whether Gender-based Dower Statutes are Constitutional.

Similar statutes have been upheld as constitutional in *Estate of Baer*, 562 P.2d 614 (Utah 1977); *Estate of Rincon*, 327 S.2d 224 (Fl. 1976); and *Estate of Parson*, 344 N.E. 317 (Ind. 1976). However, the Supreme Court of Florida in *Estate of Reed*, 354 S.2d 864 (Fl. 1978) held the family allowance unconstitutional on Equal Protection grounds. The Supreme Court of Alabama in *Ransom v. Ransom*, 401 S.2d 746 (Ala. 1981) held the Alabama homestead allowance statute unconsititutional as violative of equal protection.

That court, however, did not deprive the widow of her homestead allowance but extended the benefits of the homestead allowance to widowers.

The Arkansas court has itself been split on the question. In *Stokes v. Stokes*, 271 Ark. 300 (December 8, 1980) the widow's allowance statute, Ark. Stat. 62-2501, was held constitutional. However, on rehearing in *Stokes v. Stokes*, 271 Ark. 300, 613 S.W.2d 372 (February 23, 1981), the Court held both statutes attacked here were unconstitutional. On that same day in *Hess v. Wims*, 272 Ark. 413, 613 S.W.2d 85 (February 23, 1981) the Court again held Ark. Stats. 60-501 and 62-2501 unconstitutional as violative of equal protection citing *Orr v. Orr*, 440 U.S. 268, 99 S.Ct. 1102, 59 L.Ed.2d 306 (1979). Still later in *Huffman v. Dawkins Holbrooks*, 273 Ark. 520, (September 28, 1981) the court rejected yet another widow's claim finding the statutes unconstitutional and further found its decisions in *Stokes* and *Hess* to be retrospective cutting off the widow's dower rights. Finally, the Arkansas court ruled in the present case November 16, 1981, that *Stokes* and *Hess* are not being applied retroactively when the petitioner Hall is treated exactly as Mrs. Stokes and Mrs. Wims.

Arkansas appears to be the only state where the widows have been actually deprived of dower rights. The Court should act to correct this inequality.

2. Whether Gender-Based Dower Statutes Are Constitutional Is An Important Question And A Question Which Has Not Been, But Should Be, Settled By This Court.

The closest this Court has come to deciding the question is in *Kirchberg v. Feenstra*, 450 U.S. 455 (1981). There this Court held unconstitutional a Louisiana statute which enabled the husband to convey real estate jointly owned with his wife without his wife's consent. That statute defined the husband as the head and master of the household and expressly permitted him to alienate the

community property without the consent of his wife. In that case Mrs. Feenstra had filed a criminal complaint against her husband charging him with molesting their minor daughter. While incarcerated Mr. Feenstra retained appellant Kirchberg, a lawyer, to represent him and executed a mortgage on the home to secure the fee. Later Mrs. Feenstra dropped the criminal charge and her husband left the state.

Attorney Kirchberg filed an action for declaratory judgment in Federal District Court in Louisiana. Mrs. Feenstra counter-claimed challenging the constitutionality of the statute allowing alienation by the husband, joining the State of Louisiana as a defendant. The District Court granted the state's motion for summary judgment, 430 F.Supp. 642 (1977). The Court of Appeals found that the state failed to prove that the statutory grant to the husband of exclusive control over disposition of community property is substantially related to the achievement of an important governmental objective and therefore concluded that the statute violated the Equal Protection Clause, 609 F.2d 727 (1979). In this Court, Kirchberg did not claim that the provision served any important governmental interest. The judgment of the Court of Appeals was affirmed.

The statute under attack in *Kirchberg*, however, is very different than the statute attacked in Arkansas. It should be much easier to defend the plight of a widow seeking to uphold a statute guaranteeing her a minority interest in her deceased husband's estate than it is to defend the position of a lawyer seeking to foreclose on the home of a wife whose husband has left her after mortgaging the home to the lawyer. It should be far easier to find an important governmental interest in preserving the home than in severing it. The petitioner contends that reducing the disparity in economic conditions between men and women caused by a long history of discrimination against women is an important governmental objective. *Khan v.*

Shevin, 416 U.S. 351, 94 S.Ct. 1734, 40 L.Ed.2d 189 (1974). This, in fact, was the reasoning of the Arkansas Supreme Court the first time it dealt with the question in *Stokes v. Stokes*, 271 Ark. 300 (1980).

Our society is suffering the present impact of past discrimination against women that has manifested itself in the fact that there is still a substantial disparity in economic conditions between men and women. Such would be especially true in Arkansas, a state that is consistently at or near the bottom of the economic scale in this country. Ameliorating that disparity is undoubtedly an important governmental objective. The subject legislation is justifiable because more generous surviving-spouse benefits for females are necessary to alleviate the long-term effect of past discrimination because the many widows who for the majority of their lives suffered from such economic discrimination need more extensive protection than do males. No mortal can pinpoint with any reasonable accuracy the exact date on which the effects of the past discrimination have or will subside. The decision of when to terminate the remedial protections provided by the former dower laws should be left to the legislature if at all possible. The Arkansas legislature has decided that the termination date should be March 25, 1981, the effective date of Act 714 of 1981. That act, which went into effect precisely one month after the holding of the trial court in the case before the bar, attempted to remove gender distinctions from every Arkansas statute. It, of course, rewrote the two sections which were held unconstitutional in this case.

So far, four widows in Arkansas have been held by the Arkansas Supreme Court to have been caught in the trap between the effects of *Orr* and the effects of Act 714 of 1981. There may be more from Arkansas or other states. This Court should grant certiorari to decide whether or not widows caught in the legal time gap will be denied their right to take a share in their husband's estate, their statutory allowances and a homestead.

3. The Courts Of Last Resort Are Split On Whether A Widow Obtains Any Rights Under A Gender-based Dower Statute, And If So, To What Extent.

Incorporated within this issue are the issues of whether decisions holding dower statutes unconstitutional should be given prospective effect only and whether the court, rather than completely divest widows of all rights, should make those rights equal to those of widowers by extending the rights of widowers or reducing the rights of widows. The splits in the authorities come because it is easy to say that rights of men and women should be equal but much more difficult to say that in order to make those rights equal, a court must deprive an unknown group of widows of any rights whatsoever, thereby temporarily making the rights of men and women much more unequal than they would be had the objection never been raised.

The Arkansas court is so far the only court in the nation to hold that those widows who have been pressed into the duty of defending gender-based dower statutes lose all rights whatsoever in their deceased husband's estates. The Supreme Court of Alabama in *Ransom v. Ransom*, 401 So.2d 747 (Ala. 1981) held that the statute allowing the setting aside of homestead was unconstitutional as being violative of equal protection. The court, however, chose not to terminate the rights of the widow, but to extend the rights of the widower, citing *Orr v. Orr*, 374 So.2d 895 (Ala. Civ. App. 1979).

The state court said in *Orr v. Orr*, *supra*, after reversal:

> "We note at the outset that the Supreme Court of the United States in its opinion goes to some length to suggest matters of state law which might well preserve the wife's right to alimony in this instance. Specifically, the opinion suggests that this court can respond to reversal and bind Mr. Orr to continue his alimony payments on two such grounds: (1) by a neutral extension of alimony rights to needy

> husbands as well as wives, *Orr, supra*, at 272, 99 S.Ct. 1102; and/or (2) by determining that, as a contractual matter, Mr. Orr is bound to continue alimony payments by virtue of his stipulated agreement to do so. *Id.* at 284, 99 S.Ct. 1102."

The Alabama court continued:

> "Where a statute is constitutionally infirm on the basis of underinclusiveness, a court may satisfy the Constitution's commands by either extending benefits to those excluded from the scope of its coverage or by invalidation of the statute in its entirety. *Orr, supra; Welsh v. United States*, 398 U.S. 333, 90 S.Ct. 1792, 26 L.Ed.2d 308 (1970). In *Welsh, supra*, the Supreme Court stated:
>
> > 'Where a statute is defective because of underinclusion there exist two remedial alternatives: a court may either declare it a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by exclusion . . . (Citations omitted.) 398 U.S. at 361, 90 S.Ct. at 1807-1808, Harlan, J., concurring.' "

Therefore, even though the final result in *Orr v. Orr, supra*, as dealt with by the Alabama Supreme Court, was that the state courts could comply with the Equal Protection Clause by extending the rights of the sex discriminated against, as did the Alabama court again in *Ransom, supra*, the Arkansas court refused to do so in *Hall, Huffman, Hess* and *Stokes*, even though it had so extended the rights in alimony cases in *Sweeney v. Sweeney*, 267 Ark. 595, 593 S.W.2d 21 (1980).

In *Frakes v. Hunt*, 266 Ark. 171, 583 S.W.2d 497 (1979) and *Lucas v. Hancock*, 266 Ark. 142, 583 S.W.2d 491

(1979), the Arkansas court was faced with the problem of how to deal with an Arkansas statute which prevented illegitimate children from inheriting from their fathers in a way which will "prevent chaotic conditions arising from this lack of title to real property", 266 Ark. at 174. The court declined to apply *Trimble v. Gordon*, 430 U.S. 762, 97 S.Ct. 1495, 52 L.Ed. 31 (1977) retroactively. Although a holding that widows take no title to their deceased husband's estate at his death should create the same "chaotic conditions", the Arkansas court in the case at bar decided to give the decision in *Stokes* and *Hess* retroactive effect to bar dower to this petitioner based on this Court's decision in *Orr*.

This court should grant certiorari to decide whether a finding of unconstitutionality of a dower statute should be given retroactive effect.

4. Whether Decisions Holding Gender-based Dower Statutes Unconstitutional Are Prospective Only Is An Important Question This Court Has Not Settled And This Court Should Grant Certiorari Now As Many Petitions On This Question May Be Forthcoming.

The decisions of the Arkansas Supreme Court in *Stokes* and *Hess* should not have been given retroactive effect so as to divest this petitioner of dower rights which were vested on April 1, 1980, the date of her husband's death, prior to the decision in *Stokes* and *Hess*. Dower is a right vested at the time of death. *Brandham v. United States*, 287 F. Supp. 10 (W.D. Ark. 1968). Four widows in Arkansas have already been divested. There may be more in Arkansas and there may be others from other states. If and when those rights may be divested is a question this Court should answer.

The closest this Honorable Court has come to deciding this issue was in *Feenstra*, *supra*. There, this Court affirmed the Fifth Circuit Court of Appeals in its holding that the Louisiana statute enabling a husband to alienate

property without the consent of the wife was unconstitutional. The Court of Appeals said at 609 F.2d 735:

> "We apply our decision today prospectively only, because a holding of retrospective validity of Art. 2404 would create a substantial hardship with respect to property rights and obligations within the State of Louisiana. The Supreme Court has said:
>
> > 'The actual existence of a statute prior to [a determination of unconstitutionality], is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration. The effect of the subsequent ruling as to the invalidity may have to be considered in various aspects,—with respect to particular relations, individual and corporate, and particular conduct, private and official. Questions of rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in the light of the nature both of the statute and of its previous application, demand examination.' *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 374, 60 S.Ct. 317, 318-319, 84 L.Ed. 329 (1940)."

The Court of Appeals then said:

> "Since our decision could produce substantial inequitable results if applied retroactively, we avoid that 'injustice of hardship' through a holding of nonretroactivity. *Cipriano v. City of Houma*, 395 U.S. 701, 706, 89 S.Ct. 1897, 23 L.Ed.2d 647 (1969); *Great Northern R. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 364, 53 S.Ct. 145, 77 L.Ed. 360 (1932)."

This Court affirmed the decision of the Court of Appeals, the concurring opinion of Mr. Justice Stewart stating:

> "While it is clear that the Court is correct that the judgment of the Court of Appeals applied to the particular mortgage executed by Mr. Feenstra, it is equally clear that that court's explicit announcement that its holding was to apply only prospectively means that no other mortgage executed before the date of the decision of the Court of Appeals is invalid by reason of its decision."

These same standards applied by the Court of Appeals in *Kirchberg* and affirmed by this Court should have been used by the Arkansas Supreme Court in the present case by excluding the petitioner from the effect of its decision in *Stokes* and *Hess*.

Dower existed at common law. *Arbaugh v. West*, 127 Ark. 98, 192 S.W. 171 (1917). The Arkansas Supreme Court could have declared the statute unconstitutional and then changed the common law to equalize the rights of the sexes without completely taking the rights of one sex away. Apparently, it thought that this Court's decision in *Orr v. Orr*, *supra*, foreclosed that possibility. This Court should grant certiorari to clear up the misunderstanding and establish that the effect of a finding of unconstitutionality of the dower statute should not have retroactive results for reasons stated and the reasons stated by this court in *Lemon v. Kurtzman*, 411 U.S. 192 (1971).

This Court in *Chevron Oil Co. v. Huson*, 404 U.S. 97 referred to a three-part test to determine whether to make a decision non-retroactive:

(a. Did the decision to be applied establish a new principle of law?

(b. Does retrospective application further or retard operation of the new rule?

(c. Where do the equities lie?

This test was met in the case before the Court.

Petitioner submits that whether to use prospective application or retrospective application is widely misunderstood. This Court should grant certiorari to strengthen sexual equality without destroying real estate titles.

CONCLUSIONS

For these reasons a writ of certiorari should issue to review the judgment and opinion of the Arkansas Supreme Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this____day of February, 1982, three copies of the petition for certiorari were mailed, postage prepaid, to Mr. Randall L. Gammill, P.O. Box 532, Hazen, Arkansas, 72064, and upon Mr. Harold Hall, Suite 415, 300 Spring Building, Little Rock, Arkansas, 72201, as the attorneys of record for respondent. I further certify that all parties required to be served have been served.

R. David Lewis
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Appendix

APPENDIX

SUPREME COURT OF ARKANSAS

No. 81-135

Opinion Delivered November 16, 1981.

HELEN STROHL HALL,

Appellant,

V.

LAMAR HALL, Executor

Appellee.

Appeal from Prairie Probate Court, Southern District; Jim Hannah, Judge.

Affirmed.

GEORGE ROSE SMITH, Associate Justice

GEORGE ROSE SMITH, J. Charles L. Hall died on April 1, 1980. His will left all his property to a minor son adopted during an earlier marriage. The appellant, Hall's widow, who had married him in 1977, filed an election to take against the will and a petition for her statutory allowances. Ark. Stat. Ann. §§60-501 and 62-2501 (Repl. 1971). The appellee executor filed a response on October 6, 1980, asserting the unconstitutionality of the statutes. On December 2 the executor reasserted his position in a motion for summary judgment. On February 25, 1981, the probate court entered a summary judgment denying the widow any interest in the estate and citing our decisions handed down two days earlier. *Stokes v. Stokes*, 271 Ark. 300, 613 S.W.2d 372 (1981); *Hess v. Wims*, 272 Ark. 43, 613 S.W.2d 85 (1981). This appeal is from that summary judgment. Our jurisdiction attaches under Rule 29 (1) (c).

We decline at the outset to overrule *Stokes* and *Hess*, which disposes of the appellant's first argument.

Second, the appellant asks that *Stokes* and *Hess*, not be given any retroactive effect. Her argument is that at one time the Supreme Court held that an unconstitutional statute confers no rights. *Norton v. Shelby County*, 118 U.S. 425 (1886). It is asserted, however, that in recent years the Supreme Court has modified that rigid rule by holding that some constitutional decisions should have prospective effect only. *Lemon v. Kurtzman*, 411 U.S. 192 (1973); *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971).

We do not regard the Supreme Court's gradual change of language—which is all we think it to have been—as having the far-reaching effect the appellant attributes to it. A constitutional decision such as *Stokes* or *Hess* has never been completely retroactive in the sense that a widow who was awarded her statutory dower some years before those cases were decided could now be stripped of her estate at the demand of a disgruntled heir. The death knell of our gender-based statutes governing the widow's dower and allowances was actually sounded on March 5, 1979, when the Supreme Court decided *Orr v. Orr*, 440 U.S. 268. After that prouncement the invalidity of our statutes was promptly raised in *Stokes*, in *Hess*, and in the case at bar, before the rights of the widows had finally vested. Thus the present appellant, Mrs. Hall, is in precisely the same position as were Mrs. Stokes and Mrs. Wims in the earlier cases. Those decisions are not being applied retroactively when we treat her exactly as they were treated.

Third, the defect in our gender-based statutes was corrected as of March 25, 1981, by the enactment of Act 714 of 1981, which created gender-neutral awards of dower, curtesy, and allowances. §§60-501 and 62-2501 (Supp. 1981). The appellant argues that we should somehow make that statute retroactive or reach the same result by extending the benefits of the earlier dower statutes to surviving husbands.

We do not think that such an essentially legislative step lies properly within the power of the courts. We adhere to our view, expressed only recently, that Act 714 is substantive rather than procedural and therefore should not be applied retroactively. *Huffman v. Dawkins*, 273 Ark. 520, ___ S.W.2d ___ (Sept. 28, 1981). Nor can the principle of *Sweeney v. Sweeney*, 267 Ark. 595, 593 S.W.2d 21 (1980), be invoked as a basis for awarding this appellant an interest in her late husband's estate. For one thing, *Sweeney* dealt with alimony, a periodic allowance lying continuously within the control of the chancery court. For another, that decision rested upon the inherent powers of a court of equity; but this appeal is from the probate court, which is a court of law. *Merrell v. Smith*, 226 Ark. 1016, 295 S.W.2d 624 (1956); *Young v. Young*, 201 Ark. 984, 147 S.W.2d 736 (1941).

Affirmed.

Opposition

Office - Supreme Court, U.S.
FILED
MAR 16 1982
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In the

Supreme Court of the United States

OCTOBER TERM 1981

NO. 81-1527

Helen Strohl Hall ..... *Petitioner*

V.

Lamar Hall ..... *Respondent*

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION

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QUESTIONS PRESENTED FOR REVIEW

1. Does standing to litigate the constitutionality of a gender-based dower statute exist in the male executor of the estate of the deceased male, which executor is also the guardian of a minor male son who was to receive everything under the deceased's will?

2. Is a gender-based dower statute unconstitutional?

3. Assuming a gender based dower statute is unconstitutional, does the widow who has applied for dower receive nothing, or receive an amount equal to what a male survivor should have received, or receive exactly what she would have received under the unconstitutional statute because the court may extend the rights of disadvantaged male survivors to that level of rights possessed by female survivors?

4. When the State's highest court has declared gender-based dower statutes unconstitutional in a prior case, what is the effect of that decision on a widow whose husband died prior to the opinion in the prior case, but whose case reaches the state's highest court subsequent to that decision?

LIST OF PARTIES

Petitioner has correctly listed the parties involved.

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In the

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Helen Strohl Hall ..... *Petitioner*

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ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION

OPINION BELOW

The opinion of the Arkansas Supreme Court is found at 274 Ark. 266, 623 S.W.2d 833 (1981), and is re-produced in the appendix to the Petition for Writ of Certiorari at Page A-1.

JURISDICTION

The petitioner relies upon 28 U.S.C. §1257 (3) as the basis of this Court's jurisdiction.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The petitioner has adequately set forth the constitutional provisions involved.

STATEMENT OF THE CASE

The statement by the petitioner is essentially correct, but the following is to clarify the date of the marriage of petitioner and decedent, the date of the will and the date of the death of decedent.

The petitioner and decedent were married on July 8, 1977, and lived together less than three years before his death on April 1, 1980. The decedent left a will dated June 20, 1979, leaving his entire estate to his adopted son by a previous marriage.

REASONS FOR DENYING THE WRIT

1. The State Courts of Last Resort Are Not Split With Regard To Whether Gender-based Dower Statutes Are Constitutional.

The State courts of last resort are not split as petitioner would have you believe. Petitioner cites the cases of *Estate of Baer*, 562 P.2d 614 (Utah 1977); *Estate of Rincon*, 327 S.2d 224 (Fl. App. Ct. 1976); and *Estate of Parson*, 344 N.E. 317 (Ind. 1976) for the proposition that similar statutes that have been upheld as constitutional in other states. These decisions were decided before *Orr v. Orr*, 440 U.S. 268 (1979), and petitioner cites no cases since that date in which states have declared gender-based statutes constitutional.

Further, since the decision in *Orr*, the legislature in each of the above mentioned states has amended its laws so as to be gender neutral, as did Arkansas on March 25, 1981, after the Arkansas Supreme Court decisions in *Stokes v. Stokes*, 271 Ark. 300, 613 S.W.2d 372 (1981), and *Hess v. Wims*, 272 Ark. 413, 613 S.W.2d 85 (1981). See *Utah Code Annot.* §§75-2-113 and 75-2-201; *Florida Stat. Annot.* §§732.11, 732-201 et seq.; *Burns Indiana Stat. Annot.* §§29-1-4-1, 29-1-4-2 (repealed) and 29-1-4-3 (repealed). Thus, the states cited by petitioner as

allegedly giving rise to a conflicting treatment in this area have, in fact, not had the occasion, nor will they have the occasion, to apply *Orr* to their own state laws. No conflict exists among the states as to the constitutionality of gender-based dower statutes.

2. The Constitutionality of the Statutes In Question Does Not Present This Court With a Case Worthy of Hearing Under the Extraordinary Writ of Certiorari.

It is hard to understand the reasoning of petitioner on page 16 of the petition that "Our society is suffering the present impact of past discrimination against women that has manifested itself in the fact that there is still a substantial disparity in economic conditions between men and women." From the beginning, wives could exclude their husbands from their estates by leaving it to others by a will that denied the husband his curtesy rights. The husband could not exclude his wife from dower by his will until the Supreme Court of Arkansas, on February 23, 1981, in a rehearing in *Stokes v. Stokes*, 271 Ark. 300, 613 S.W.2d 372 and in the initial hearing of *Hess v. Wims*, 272 Ark. 413, 613 S.W.2d 85, held that the dower statute was unconstitutional.

Even if petitioner is correct in her argument that dower should be awarded to widows to give them financial protection after the death of their husbands, petitioner asserts no justification for a statute that discriminates against widowers in the process of protecting widows. Indeed, there is none. In deciding the constitutional questions raised in *Stokes*, *Hess* and *Hall*, the instant case, the Arkansas Supreme Court correctly cited and relied upon these most recent Supreme Court cases: *Wengler v. Druggist Mutual Insurance Company*, 446 U.S. 142, 100 S.Ct. 1540 (1980); *Califano v. Westcott*, 433 U.S. 76, 61 L.Ed.2d 382 (1979); *Orr v. Orr*, 440 U.S. 268, 59 L.Ed.2d 306 (1979); *Trimble v. Gordon*, 430 U.S. 752, 52 L.Ed.2d 31 (1977); *Califano v. Goldfarb*, 430 U.S. 199, 51 L.Ed.2d 270 (1977); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 43 L.Ed. 514 (1975) and *Stanton v. Stanton*, 421 U.S. 7, 43 L.Ed.2d 688 (1975).

The instant petition presents this Court with nothing more than an opportunity to apply well established precedent to a fact situation much in point with said precedent. Arkansas, Alabama and Florida, the only states to rule upon gender-based state inheritance laws to date, have already exhibited a willingness to accept and apply the above cases. There is simply no need for this Court to grant a writ of certiorari in the instant case.

3. The Remedies Applied By State Courts To Rectify Constitutional Defects May, Either By Right or By Necessity, Differ.

Obviously, neither Alabama nor Florida was asked to pass upon the statutes found by the Arkansas Supreme Court to be unconstitutionally discriminatory. It may well be that the language of the Alabama and Florida statutes differed from the language of the Arkansas statutes. It is clear that the Arkansas Supreme Court in *Hess* and *Hall*, and also in *Huffman v. Dawkins*, 273 Ark. 520 (1981), considered the same two remedies that this Court, in *Orr*, and in *Welsh v. United States*, 398 U.S. 333, 90 S.Ct. 1792, 266 L.Ed.2d 308 (1970), recognized as possible methods to correct an underinclusive statute, namely, denial of benefits to both classes or extension of benefits to both classes. The Arkansas Supreme Court found its only alternative to be denial, as extension would have involved, in essence, legislation by the Court. *Hall*, Appendix A-3 to petition, citing *Huffman*.

The above determination was, and is, essentially a question for the state supreme court. *Dorchy v. Kansas*, 264 U.S. 286, 290 (1924); *Skinner v. Oklahoma*, 316 U.S. 535, 542-543 (1942). Petitioner should not be allowed to utilize the extraordinary writ of certiorari in order to obtain review of a question that this Court ordinarily leaves for determination by the state court.

4. The Arkansas Supreme Court Did Not Give Retroactive Effect To Any of Its Rulings.

The constitutionality of the dower statute in the present case was raised five months before the decisions in *Stokes* and *Hess* and, therefore, was an issue before the Court when the decisions were rendered. The same points raised in *Stokes* and *Hess* were likewise raised in *Hall*, and long before the Arkansas Supreme Court's rulings in *Stokes* and *Hess*.

The arguments of retroactivity and prospective application were thoroughly briefed and argued before the Arkansas Supreme Court. That said Court considered these arguments is reflected in its opinion in *Hall*. The Arkansas Supreme Court, in *Hall*, granted the constitutionally discriminated party the same relief granted by this Court in *Kirchberg v. Feenstra*, 450 U.S. 455 (1981) to the party there suffering discrimination. There was no retroactive application in the instant case, and petitioner's argument is without merit.

CONCLUSION

For the reasons stated, respondent respectfully submits that no writ of certiorari should be issued in the instant case.

Respectfully submitted,

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Attorneys for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of March, 1982 three copies of the brief for respondent in opposition to petition for certiorari were mailed, postage prepaid, to Mr. R. David Lewis, 1109 Kavanaugh, Little Rock, Arkansas, 72205, as attorney of record for petitioner. I further certify that all parties required to be served have been served.

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Petitioner's Reply Brief

Supreme Court, U.S.
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In the

Supreme Court of the United States

OCTOBER TERM 1981

No. 81-1527

Helen Strohl Hall ..... *Petitioner*

V.

Lamar Hall ..... *Respondent*

PETITIONER'S REPLY BRIEF

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In the

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PETITIONER'S REPLY BRIEF

I.

SEVERAL STATES STILL HAVE GENDER-BASED DOWER STATUTES.

Respondent states in his Brief in Opposition that the states' courts which have declared dower statutes unconstitutional have since amended their statutes to make them gender-neutral and that therefore no conflict exists among the states as to the constitutionality of gender-based dower statutes. In response to that statement petitioner researched the various states' laws on the subject and found that not only does Indiana still have gender-based dower statutes but that many other states do as well. Indiana Statute 29-1-2-2 provides that a widow has a inchoate interest in one-third of the real estate of her spouse free of creditors. That statute does not appear to have been repealed. There is no statute providing for a widower's

counterpart. The interest of the widow in that state is limited to one-quarter where the real estate value exceeds $10,000 and one-fifth when the real estate value exceeds $20,000.

The states in which petitioner was able to find gender-based dower statutes but no case as yet ruling on the constitutionality of those statutes were Georgia, Michigan, South Carolina, and Virginia. The statutes are relevant as constitutional attacks on those statutes are likely to be successful at the state level and the likelihood of those attacks lends gravity to this Petition for Certiorari.

In Georgia, under statute 113-902, if the husband survives he gets to share and share alike with the surviving children, but under 113-903(3) if the wife survives she takes share and share alike with the children with a minimum of twenty percent. Under section 113-1001.1 a husband gets a year's support while under 113.1002 a wife gets a year's support plus the furniture.

In Michigan the Uniform Disposition of Community Property Act has been enacted which applies to real and personal property acquired during marriage. However, under section 26-221 a wife gets dower of one-third of the lands whereof her husband was seized at any time during marriage but there is no corresponding curtesy right of the husband in the wife's separate property acquired prior to.

In South Carolina section 21-5-10 provides that curtesy is abolished but there is no corresponding statute abolishing dower and it is referred to in 21-5-110 through 990, which do not appear to have been repealed or amended.

Virginia may still have gender-based statutes. Although 64.1-19.1 states that dower and curtesy are synonymous, 64.1-21 states that the husband has no curtesy in the separate estate of the wife. Several statutes in this section up to 64.1-44. appear to be gender-based in reference to procedure.

II.

WHETHER THE GENDER-BASED DOWER STATUTES ARE CONSTITUTIONAL IS AN IMPORTANT QUESTION WHICH HAS NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT.

Since petitioner filed her petition for Writ of Certiorari in this court she has learned of one more decision by the Arkansas Supreme Court to the same effect as her own, *Bennett v. Bennett*, ____ Ark. ____, ____ S.W.2d (Feb. 8, 1982), another which will be ruled on in one week by the Arkansas Supreme Court, *Thomas v. Gerthsch*, Arkansas Supreme Docket Number 81-257 and at least one case on the same issue is still at the trial level in Faulkner County Chancery Court awaiting final resolution of this issue. There are no doubt others and petitioner is unaware of any means of quickly finding out how many there are. Whether gender-based dower statutes are constitutional is an issue which the United States Supreme Court has never faced and an answer is desperately needed in at least the probate courts of the State of Arkansas.

Respondent states that the instant petition presents this court with nothing more than an opportunity to apply well established precedent to a fact situation much in point with said precedent. Respondent seems to feel that unless the statute is gender-neutral that it is automatically unconstitutional. This court held to the contrary in *Michael M. v. The Superior Court of Sonoma County*, 450 U.S. 464, S.Ct. L.Ed.2d (March 23, 1981). In that case this court held that the California statutory rape law, though gender-based, was constitutional. A seventeen and one-half year old male was prosecuted for having intercourse with a sixteen and one-half year old female. Had the ages been reversed the female could not have been prosecuted. There were five different opinions written in that case with a maximum of three in any one category, which is some indication of the cert-worthiness of this petition.

The plurality opinion by Justice Renquist in that case said that this Court has not yet held that gender-based classifications are "inherently suspect" and thus the court does not apply so-called "strict scrutiny" to those classifications. The court stated that a gender-based classification will be upheld if it bears a "fair and substantial relationship" to substantial state ends. The opinion stated that this court has consistently upheld statutes where the gender classification is not invidious, but rather realistically reflects the fact that the sexes are not similarly situated in certain circumstances. The court stated that a legislature may "provide for the special problems of women". The court in that opinion stated that many young women are not similarly situated with respect to the problems and risks of sexual intercourse.

Neither are men and women similarly situated with regard to the burdens and expenses of living the remainder of their life alone or with the capability to deal with that burden. Women typically are less educated and of lower incomes. Women statistically live longer than males and therefore have a greater need for more of the marital estate from which to draw. Women are more likely to hire certain types of work done around the house than men survivors because of their own relative physical strength. These are the types of governmental objectives served by a slight discrimination in surviving-spouse benefits.

III.

THE REMEDIES TO BE APPLIED BY STATE COURTS TO RECTIFY CONSTITUTIONAL DEFECTS SHOULD NOT BE UP TO STATE COURTS TO MOLD IN A DISCRIMINATORY FASHION.

On page four of his brief respondent states that whether a state should deny benefits to the favored class is a question for the state supreme court, citing *Dorchey v. Kansas*, 264 U.S. 286, 290 (1924), and *Skinner v. Oklahoma*,

316 U.S. 535, 542-543 (1942). Those cases have nothing to do with the issue. The issue in *Dorchey* was whether or not a state statute was severable from an unconstitutional state statute. The court held that that was a decision which the United States Supreme Court may decide but is not obliged to do so. That case was cited in *Skinner* for the proposition that severability is a matter of state law. How these cases bear on the question of retrospective application is beyond petitioner's comprehension.

IV.

THE ARKANSAS SUPREME COURT DID GIVE RETROACTIVE AFFECT TO ITS RULINGS.

At the time petitioner's husband died there was no case holding gender-based dower statutes unconstitutional. Petitioner could have had no thought on the issue prior to her husbands death except that she would be entitled to dower. Had she had some other thought, she would have purchased life insurance to protect herself but she did not.

CONCLUSION

For reasons stated petitioner prays for a writ of certiorari issue.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of March, 1982, three copies of the petitioner's reply brief were mailed, postage prepaid, to Mr. Randall L. Gammill, P. O. Box 532, Hazen, Arkansas 72064 and Mr. Harold L. Hall, Pyramid Place, Suite 316, Little Rock, Arkansas 72201 as attorneys of record for respondent. I further certify that all parties required to be served have been served.

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